

# COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

Supreme Judicial Court

COMMONWEALTH

VS.

STEPHEN CASEY

Docket No. SJC - 09187  
(Bristol County)  
SJC - 09212  
(Plymouth County)

BEFORE: Chief Justice Margaret H. Marshall  
Justice John M. Greany,  
Justice Francis X. Spina,  
Justice Roderick L. Ireland,  
Justice Martha B. Sosman,  
Justice Judith A. Cowin &  
Justice Robert J. Cordy

APPEARANCES: Stephen Gagne, Esq. (Bristol County)  
Caroline Burbine, Esq. (Plymouth County)  
(for the Commonwealth)

Attorney David Lewis  
(for Stephen Casey)

Oral Argument

April 5, 2004

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**WITNESSES**

Witness	Direct	Cross	Re-Direct	Re-Cross
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**Exhibits:**

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## PROCEEDINGS

MALE: The order is [inaudible].

COURT OFFICER: Commonwealth vs. Casey.

THE COURT: Mr. Gagne?

MR. GAGNE: Yes.

THE COURT: You have seven and a half minutes, as I understand it.

MR. GAGNE: Thank you, your Honor.

THE COURT: You may proceed.

MR. GAGNE: Thank you. May I please the court?

11 My name is Steven Gagne. I represent the Bristol District  
12 Attorney's office in this case. There are two cases  
13 consolidated here this morning; one arising from the  
14 defendant's conviction in Bristol County, for raping a  
15 child, and indecent assault and battery on a person under  
16 14. The other is from the defendant's guilty plea to the  
17 same charges in Plymouth County.

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1                   THE COURT: Not for very long.

2                   THE COURT: Yeah, he—

3                   MR. GAGNE: He was there for two minutes.

4                   THE COURT: And he asked a question.

5                   MR. GAGNE: He asked a question of some unknown  
6                   sort. He was in there for less than one half of one  
7                   percent of the juror's entire time of deliberations, which  
8                   was over seven hours.

9                   THE COURT: And for all we know, that question  
10                   could have been something simple, like, "Am I supposed to  
11                   be here?"

12                   MR. GAGNE: Precisely, "What time is lunch?"

13                   THE COURT: But even if we assume that it was the  
14                   absolute worse question that could have been asked, even if  
15                   we assume, from the [government's] point of view, or from  
16                   either point of view, if we assume that that [inaudible],  
17                   shouldn't we find the defendant guilty?

18                   MR. GAGNE: Yes.

19                   THE COURT: There is still no prejudice to the  
20                   defendant. There is no effect. It's meaningless, because  
21                   three hours later, or four hours later, the jury came out  
22                   and said that they were nine to three to acquit. And then  
23                   three and a half hours later, they were 12-0 to convict.  
24                   So the juror who was in there for two minutes and asked one

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1 question, even if he asked the worst possible question,  
2 could not have had any impact on this jury.

3 MR. GAGNE: The Commonwealth agrees, and for two  
4 reasons, this case is distinguishable from Smith, Sheahy  
5 and Jones. First is that it was two minutes, not the  
6 entire length of the deliberations, which I believe is the  
7 factual scenario in those three cases, and second, we do  
8 have this other circumstance, this knowledge which granted,  
9 we shouldn't have had. The jury shouldn't have come back  
10 and said "We're nine to three to acquit"—

11 THE COURT: Mr. Gagne—

12 MR. GAGNE: But we do know that.

13 THE COURT: Mr. Gagne, let me ask you this.  
14 Let's assume that you were to call back some exceptions,  
15 just a minute, it is unlikely that you would have precisely  
16 these facts in another case. So if we are to give  
17 prosecutors, and defense counsel, and trial judges  
18 guidance, what would the remedies be [to call that] an  
19 exception?

20 MR. GAGNE: I would urge the court to adopt the  
21 reasoning in State vs. Kusick, the Supreme Court of  
22 Washington, which this court actually did in Smith, where  
23 the court said that when there is a substantial intrusion  
24 into the deliberations, prejudice should be presumed, and

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1 the defendant does not need to make a showing. And in that  
2 case, the State vs. Kusick, the court also said that in  
3 that case where the intrusion involves the physical  
4 presence of a non-juror for the full length of  
5 deliberations—

6 THE COURT: Well that we understand.

7 MR. GAGNE: Yes.

8 THE COURT: That's easy, I mean, relatively easy.  
9 What about a juror who sits there, and indeed, may have  
10 participated, not understanding, you know, for some period  
11 of time. Here it seems to be somebody went in, and at the  
12 very least, one would hope that the judge could inquire  
13 what did you say.

14 MR. GAGNE: Yes.

15 THE COURT: If his question had been, "Am I  
16 supposed to be here? Do you know where the cafeteria is?"  
17 you know—

18 THE COURT: Where is my umbrella? I'm getting my  
19 umbrella, it's raining out.

20 THE COURT: That's easy. But let's assume that  
21 the jury deliberated here for seven hours, right?

22 MR. GAGNE: Yes, over seven.

23 THE COURT: Now, let's assume that the juror was  
24 there for one hour, and then somebody said "Oops, didn't

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1 realize that the alternate-- Where is the alternate? Oh  
2 my god, it is the alternate who [inaudible] and pulled that  
3 juror out."

4 MR. GAGNE: Yes. You're saying that that comes  
5 under Smith, or not under Smith? Under that, that would be  
6 a more troubling situation. That would be distinguishable  
7 from this case. I would say the factors to consider would  
8 be the length of time that the juror was there, whether the  
9 juror said anything during that time, if so, what the juror  
10 said, and what curative steps the Judge took when that-

11 THE COURT: Whether--

12 MR. GAGNE: --was detected.

13 THE COURT: --[inaudible] whether the juror said  
14 anything during that period of time is really beginning to  
15 ask-- And here it seems to me you [inaudible] been able to  
16 inquire, because it was so brief.

17 MR. GAGNE: Yes.

18 THE COURT: You know, that's the umbrella case.

19 THE COURT: And here you could inquire without  
20 getting the answer. You could just ask what the question  
21 was.

22 MR. GAGNE: Precisely.

23 THE COURT: And that way you don't get into the  
24 deliberations, you-

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1                   MR. GAGNE: Only what the influence was; only  
2 what the statement or question was, not how did anyone else  
3 react to it, not did anyone answer your question? Here,  
4 that inquiry should have occurred. That should have  
5 occurred—

6                   THE COURT: Let's assume, for example, that what  
7 the juror said is, "Haven't you people made up your mind?  
8 He's clearly guilty." That's what he said. Now you have  
9 nine-three voting to acquit, and there turns out to be a  
10 conviction. Could one not argue that while they were in  
11 the midst of their later deliberations, somebody said well  
12 here is the alternate. He thought it was a slam dunk case,  
13 or she thought it.

14                  MR. GAGNE: Yes. A statement that biased in one  
15 direction, surely I believe could be grounds for  
16 [inaudible] in this trial for reversing conviction. Even  
17 if he was only in there for 15 or 20 minutes, but the  
18 statement was that—

19                  THE COURT: What if it—

20                  MR. GAGNE: --egregious.

21                  THE COURT: What if the defendant, or the  
22 Commonwealth, can go either way? You know, take it the  
23 other way then. Both people, both party's way. You know,  
24 even if it's an egregious statement, or I think he's

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1 guilty, or you want my initial-- He's in there for five  
2 minutes. The chair, the floor person says "All you in  
3 favor of convicting" he puts up his hand. Nothing said.  
4 The judge has a [inaudible] finds that out and both the  
5 Commonwealth and the defendant said "We don't want a  
6 mistrial."

7 MR. GAGNE: Well, in that case I would say the  
8 defendant had waived his rights. Now, in the case where  
9 the alternate is present throughout-

10 THE COURT: That's [inaudible]

11 MR. GAGNE: But doesn't say anything, the  
12 defendant can still pursue his rights on appeal, because  
13 the prejudice is presumed. But here, if we knew what the  
14 nature of the intrusion was and the defendant still waived,  
15 then he knows what the influence was. He decides "I'm  
16 going to go forward anyway." And in fact here, this error  
17 wasn't detected until after the jurors sat from [inaudible]  
18 9:00 to 3:00 to acquit. So at this point, the defendant  
19 knew, "If I hold on a little longer, perhaps it's an  
20 acquittal." He chose to proceed, even knowing that the  
21 juror had been in there for the first two minutes, still  
22 not knowing what was said during those two minutes. But he  
23 went forward, he was ultimately convicted, but now he had  
24 the trump card of those two minutes, and he prevailed on

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1 the Motion for a New Trial.

2 So I'd say he really had, he had a win/win  
3 situation at that point; no guarantees the judge shouldn't  
4 have allowed the Motion for a new Trial, but here, this  
5 situation is distinct from Smith, Jones and Sheahy, where  
6 the influence cannot be measured. Even if a person sits  
7 there quietly, does not say a word, it's the gestures, the  
8 body language, even the rolling of the eyes, which just  
9 can't be detected. And we can't try, in that situation,  
10 and truly detect what the nature of the influence was,  
11 because it's pervasive throughout. But here it's two  
12 minutes, it's one question, that inquiry should have been  
13 made.

14 THE COURT: Do you, are you saying that we just  
15 use how much time passed as a way for informing judges as  
16 to whether they should make inquiry or not?

17 MR. GAGNE: [Yes].

18 THE COURT: If the alternate is in there for less  
19 than an hour?

20 MR. GAGNE: That's, that's certainly perhaps-

21 THE COURT: Did he-

22 MR. GAGNE: That's one of the most significant  
23 factors. But as far as [willing] to draw the line-

24 THE COURT: [inaudible]

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1                   MR. GAGNE: Ten minutes may not be much in a  
2 deliberation of eight hours, but when it's only half an  
3 hour-

4                   THE COURT: No. The [inaudible] be the judge  
5 should make the inquiry, what was the extraneous influence.

6                   MR. GAGNE: Yes.

7                   THE COURT: What got said. What we have here is  
8 though, the inquiry was not made, and the defendant made  
9 any objection, at the time, [inaudible] stuck with it.

10                  THE COURT: So what would the-

11                  MR. GAGNE: [inaudible]

12                  THE COURT: What would the judge ask? What did  
13 you say? What was said?

14                  MR. GAGNE: Yes.

15                  THE COURT: Were there any facial movements, any  
16 raising of the eyebrows, any-

17                  THE COURT: [inaudible] [said].

18                  THE COURT: Would you go down a checklist?

19                  MR. GAGNE: It would only be what, alternate  
20 juror, what did you say during that time?

21                  THE COURT: Yes.

22                  MR. GAGNE: --not asking what reactions they've  
23 got. How long you were in there. And I would ask, at what  
24 point did this occur? Here it's the first two minutes,

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1 where it seems implausible that they were deeply into a  
2 substantive analysis of the evidence. It very well could  
3 have been just let's get things organized and started here.  
4 And if you look at what the juror tried to say when he was  
5 asked if deliberations had begun, he actually began to say  
6 "Well no." And Judge Chin said "No, I don't want to  
7 [inaudible] [relate]" but-

8 THE COURT: But no, but your hypothesis isn't  
9 necessarily correct, because some juries, probably more  
10 than a few, immediately take a vote.

11 MR. GAGNE: Sure.

12 THE COURT: So it could have been in the first  
13 two minutes the floor person said "Okay, we'll start by  
14 taking a vote" and it could have been the alternate said,  
15 "What, what do we need a vote for? The guy is clearly  
16 guilty." I mean, "Isn't he guilty?"

17 MR. GAGNE: It's entirely possible that-

18 THE COURT: I mean, isn't he guilty?

19 MR. GAGNE: --in the first 30 seconds, an  
20 alternate juror's influence could have tainted this juror  
21 deliberation. He could have walked in and said, "Can  
22 anyone believe what that defendant just testified to?"  
23 That type of question, sure, it could, under certain  
24 circumstances. But here we don't know what the question

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1 was. We do know it was only two minutes, and halfway  
2 through there were nine to three in favor of acquittal  
3 [anyway]. But those limited circumstances, I believe the  
4 Motion for a New Trial should not have been allowed.

5 And as far as setting a clear standard, this  
6 doesn't seem to be a situation that occurs that often.  
7 This is a narrow, factual scenario, and under these facts,  
8 the motion should not have been allowed.

9 THE COURT: Thank you.

10 THE COURT: Before you sit down, I know you  
11 [inaudible] I have one question on just one part of this  
12 case.

13 THE COURT: Is that, do you have a [inaudible] in  
14 this case?

15 THE COURT: No, on a different part of this case.  
16 Clearly the victim shouldn't have spoken to the victim's  
17 um, to the-- The victim shouldn't have spoken to the  
18 alternate in the corridor. This is a different part of  
19 this case.

20 MR. GAGNE: Yes.

21 THE COURT: But the victim's conversation with  
22 the alternate in the corridor, am I correct, was after the  
23 alternate had been in the jury room. Is that correct?

24 MR. GAGNE: Yes.

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1                   THE COURT: So that, so the alternate had no more  
2 contact with the jury after the conversation, therefore,  
3 whatever the conversation was between the alternate and the  
4 victim couldn't have been brought to the jury's attention,  
5 am I right?

6                   MR. GAGNE: It may as well have been a stranger  
7 on the street, yes.

8                   THE COURT: Yes, okay.

9                   MR. GAGNE: Yes.

10                  THE COURT: Okay. I just wanted to be sure. All  
11 right.

12                  THE COURT: Thank you, Mr. Gagne.

13                  MR. GAGNE: Thank you, your Honor[s].

14                  THE COURT: Mr. Lewis?

15                  MR. LEWIS: [inaudible] motions [inaudible]  
16 switch back and forth.

17                  THE COURT: Mr. Lewis, you're going to do both  
18 cases?

19                  MR. LEWIS: Yes. May I please the court? My  
20 name is David Lewis. I represent Mr. Casey on both of  
21 these cases. To address the question that started off the  
22 oral argument with Mr. Gagne, Attorney Gagne, you were  
23 asking about that clearly, you know, there is this nine to  
24 three vote for acquittal after the, after the alternate is

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1           in there. You know, with all due respect, I think it's  
2 speculation whether or not that question may have even  
3 favored him, because I think it could have gone either way.  
4 You have, there is no way of knowing whether that [spurred]  
5 the nine people, or [inaudible] in one of the three. There  
6 is no, there is simply no way to know that.

7           I think another point that was addressed in that  
8 argument about the fact it was the first two minutes. I  
9 think that's logically fallacious, because it automatically  
10 favors the first two minutes over the middle two minutes,  
11 or over the last two minutes. And as you've just pointed  
12 out, they may take votes right when they go in. There may  
13 be something—

14           THE COURT: Mr. Lewis, usually, the point there  
15 would be any two minutes.

16           MR. LEWIS: Right.

17           THE COURT: That is to say, let's assume that you  
18 go through the first five arguments, and then for some  
19 reason the alternate juror somehow is back up in the jury  
20 room. I mean, I think, at least in my mind it's two  
21 minutes, not-- And then if it's sufficiently discreet,  
22 perhaps making the [inaudible] include to find out what was  
23 said.

24           MR. LEWIS: Right. I mean, I don't think it, I'm

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1 saying I don't think it makes a difference which two  
2 minutes it is. I think you have to, once they're  
3 deliberated, they're deliberated, and -

4 THE COURT: But could I ask you, though, as I  
5 understand it, by the time this came to the judge's  
6 attention, it was at the same time revealed where the vote  
7 stood.

8 MR. LEWIS: I believe they had the note from the  
9 jury-

10 THE COURT: Jury.

11 MR. LEWIS: --where they stood at the end of the  
12 first day-

13 THE COURT: Right.

14 MR. LEWIS: --of deliberations.

15 THE COURT: Okay.

16 MR. LEWIS: And this was, he found out at the  
17 beginning of the second day.

18 THE COURT: Day. So by that time, everybody knew  
19 that that's where the deliberations stood.

20 MR. LEWIS: Correct.

21 THE COURT: The judge made brief inquiry of the  
22 juror, but did not, in fact, even allow the juror to state  
23 what the juror himself had said in the jury room.

24 MR. LEWIS: Right.

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1                   THE COURT: And defense counsel made no request  
2 at that time, "No judge, I want to know what the extraneous  
3 influence was." Given the, on the [odd] facts of this  
4 case, can we not view that as a very purposeful, strategic  
5 decision that defense counsel didn't want there to be a  
6 reason to declare a mistrial, because all of the signals  
7 were, which one wouldn't normally have, was that this was  
8 headed towards perhaps an acquittal, or in fact, the report  
9 had been deadlocked. So he's already got, [he thinks] he's  
10 already got a mistrial. I might even get an acquittal. I  
11 do not want something now brought to the judge's attention  
12 to cause the judge to back off from that.

13                   Why shouldn't that be a waiver, a strategic  
14 waiver on very peculiar facts, but a very strategic waiver?

15                   MR. LEWIS: I submit that you're giving the trial  
16 counsel way too credit, that is not supported by this  
17 record. If, in fact, he was doing, in [logical thinking]  
18 if he had known what Smith said, and known what Jones and  
19 Sheahy said about lack of waiver, about what they require,  
20 known, if he would have known that, supposedly,  
21 theoretically, it seems to me in your question he would  
22 have known that, and had the sort of cat in the bag, that  
23 as soon as the verdict came in, he would have said "Your  
24 Honor" or very shortly thereafter, he would have said, "You

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1 know something, your honor? On the break I ran into, I've  
2 got these cases. This is a non-waiverable, [hearsay]  
3 reversible error. There is no requirement I show  
4 prejudice. He was present there. He was in there during  
5 deliberations. But I submit-

6 THE COURT: It wasn't his perception about the  
7 cases, it was his read of I've got a jury leaning in my  
8 favor. They reported deadlock yesterday, so I'm, you know,  
9 I may well just get a deadlock and a mistrial anyway, and I  
10 don't want to give up on the possibility of, because it  
11 looks like this is headed for an acquittal, and I don't  
12 want to lose it.

13 THE COURT: Yes, the defense attorney doesn't  
14 have to know anything about past cases. All he knows is  
15 that right now it's nine to three-

16 THE COURT: Three.

17 THE COURT: --in his favor.

18 THE COURT: He doesn't want a mistrial.

19 THE COURT: He doesn't want to mess this up, so  
20 he doesn't want an inquiry of the juror. It seems like a  
21 clear, strategic decision.

22 MR. LEWIS: In Smith, I knew [inaudible] Smith,  
23 and I can't recollect right now if it was the case in  
24 Sheahy, but the defense attorneys in those cases had

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1           actually [inaudible] let the alternates in there. And this  
2           court had said "That's no waiver" and had opined [in dicta]  
3           I believe it was in Sheahy, said—

4           THE COURT: No, but it's different from, I think  
5           it's different when it's a strategic decision to let it go  
6           that way.

7           THE COURT: Well, they strategically wanted the  
8           alternates—

9           MR. LEWIS: Well—

10           THE COURT: --in, correct? In Sheahy, I know in  
11           Sheahy, and maybe, well may be in Smith certainly, I don't  
12           know. But I think in both of them. Defense counsel and  
13           the Commonwealth affirmatively had said yes, it's fine. It  
14           wasn't clear to me, by the way, whether they were  
15           authorizing him to vote as well. But if he said let them  
16           vote, and we don't have any objections. I mean, that could  
17           be viewed as I have no idea why you want the alternates in,  
18           but maybe hoping that the alternates maybe, by body  
19           language or something else influenced, who knows? But that  
20           was clearly strategic, right?

21           MR. LEWIS: What, my case?

22           THE COURT: No, no, no, in Smith. And the court  
23           said too bad, you can't do it.

24           MR. LEWIS: Yes. I think in the case, I think in

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1           Smith and Sheahy, I think they just, they agreed to have  
2           them in there. And I don't think there really, there  
3           really wasn't much case law in Massachusetts on that point  
4           anyway, but it would certainly let them know one way or the  
5           other-

6           THE COURT: Yeah.

7           MR. LEWIS: You know, how egregious that may have  
8           been. But as far as whether you can let, you know, even if  
9           you give them the benefit of the doubt and you say it was a  
10           strategic decision, it was in [inaudible] in Sheahy that I  
11           think is actually, you know, quite correct.

12           THE COURT: Right, but-

13           MR. LEWIS: Because of, because of the nature of  
14           the [right] if he should-

15           THE COURT: But Sheahy and Smith and the others  
16           do not have the bizarre fact of the lawyers already knowing  
17           where the jury vote stood. This defense counsel knew it  
18           was nine to three in favor of acquittal, what's the chance  
19           that the three are going to turn around the nine, as  
20           opposed to the nine turning around the three? Or worse  
21           case, it's deadlock.

22           MR. LEWIS: It wasn't his right to waive. And if  
23           he was going to, if waiver was going to occur, it was the  
24           defendant's right to waive that. And it should have been,